# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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July 28, 1998

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 95-116, RM 8535 - In The Matter of Telephone Number Portability

Dear Secretary Salas:

On July 28, 1998, the New York Department of Public Service filed a Petition for Reconsideration of the Third Report and Order in which the signature page was inadvertently omitted. Enclosed is an original and fourteen (14) copies of the corrected Petition for Reconsideration.

Sincerely,

Cheryl L. Callahan

Cheryl L. Callahan
Assistant Counsel

Enclosure

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of Telephone Number Portability | ) | CC Docket No. 95-116 |
| | ) | RM 8535 |

NEW YORK DEPARTMENT OF PUBLIC SERVICE
PETITION FOR RECONSIDERATION

INTRODUCTION AND SUMMARY

The New York Department of Public Service (NYDPS) seeks reconsideration, pursuant to 47 U.S.C. 405 and 47 C.F.R. 1.429, of the Commission's Third Report and Order in CC Docket No. 95-116, In the Matter of Number Portability, Released May 12, 1998 (Third Report and Order).[1/] In this order, the Commission sets forth the manner for distributing and recovering the costs of long-term number portability. Specifically, it requires distribution of shared costs (recurring and nonrecurring) amongst all telecommunications carriers on a regional basis (Para. 38, 68-72, 113-114, 116), and it authorizes local exchange companies to impose an end-user surcharge to recover all costs of number portability (Para. 75, 135-149).

The instant petition seeks reconsideration of those portions of the Third Report and Order that: (1) establish a mechanism that allows local exchange carriers to recover their assignment of costs for the creation of the regional databases and the initial physical upgrading of the public switched network related to proving number portability through a surcharge on end-users, and (2) permits incumbent local exchange carriers to

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1/ 63 Fed. Reg. 35,150 (1998).

recover their ongoing costs directly related to providing number portability, including their intrastate costs, through a federal charge assessed on end users.

We agree that in order for costs to be borne by all telecommunications carriers on a competitively neutral basis, as required by the Act, the costs of establishing number portability should be distributed amongst carriers on a regional basis. However, as a matter of policy, the establishment of national rules for cost recovery from end-users is not needed. Moreover, it is not necessary for the Commission to authorize the ongoing cost recovery mechanism for each carrier. In fact, the establishment of a national cost recovery end-user charge and the continued oversight of the ongoing costs of each carrier are likely to upset the carefully crafted balance many states have struck to provide greater regulatory flexibility for the incumbents while establishing pro-competitive policies. Conversely, the Commission's pro-competitive policies would not be harmed by state involvement.

Further, Section 251(e)(2) limits the Commission's authority to determining the extent to which each carrier bears the costs of establishing number portability. The plain language of Section 251(e)(2) does not permit the Commission to establish an end-user collection mechanism for intrastate number portability costs and it does not allow for a centralized approach to the recovery of the ongoing intrastate costs of implementing number portability. As Commissioners Ness and

Furchtgott-Roth state, a division of number portability costs between the states and federal jurisdiction, as recommended by the National Association of Regulatory Utilities Commissioners (NARUC), is consistent with the Act's pro-competitive policies. We urge the full Commission to reevaluate its decision.

## I. AS A MATTER OF NATIONAL POLICY, A NATIONAL COST RECOVERY PLAN COULD HARM CONSUMERS AND HINDER COMPETITION

In the Third Report and Order, the Commission concludes that to prevent carriers from recovering costs in a manner that violates the competitive neutrality requirement of the 1996 Telecommunications Act, it will permit local exchange carriers to recover their number portability costs through a federal end-user surcharge (Para. 39). However, the Commission has fulfilled its responsibility to ensure competitive neutral distribution of costs by establishing a methodology for costs to be shared by each telecommunications carrier (Third Report and Order Para. 87-92, 105-110, 113-114, 116, 119).[2/]

The Commission has a history of appreciating the role that states play in dealing with the costs associated with number portability. In 1995, the Commission specifically requested comment on how carriers should allocate the cost of long term

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[2/] The Commission adopted a two prong competitive neutrality test. This test requires that the number portability costs borne by each carrier must not: (1) give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber; and (2) disparately affect the ability of competing service providers to earn a normal return (Para. 53).

number portability between the federal and state jurisdictions.[3/] Even after the passage of the 1996 Act, the Commission recognized billing and rating issues related to intrastate service in connection with number portability are more properly addressed by the states.[4/] In the same document, the Commission tentatively concluded that "section 251(e)(2) does not address recovery of [number portability] costs from consumers, but only the allocation of such costs among carriers."[5/] There is no reason to deviate from these earlier conclusions.

As both Commissioner Ness and Commissioner Furchtgott-Roth noted in their individual statements in this proceeding, it is possible to support a policy that provides for both roles.[6/] Commissioner Ness stated,

> I also want to note that I would have been willing to support a division of number portability costs between the states and federal jurisdictions, as recommended by the National Association of Regulatory Utility Commissioners. This approach would have enabled state commissions to make judgments

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[3/] In Re Telephone Number Portability, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12368 (1995).

[4/] See, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, Para. 63 (1996) [wherein the Commission stated, "[t]raditionally the billing and rating of local wireline calls . . . have been left to the purview of the states and the carriers themselves]."

[5/] Id. at Para. 209.

[6/] See, Third Report and Order, Concurring Statement of Commissioner Susan Ness and Separate Statement of Commissioner Harold Furchtgott-Roth.

> about the appropriate manner and timing of cost recovery on the part of ILECs.[7/]

Commissioner Furchtgott-Roth agreed and stated,

> As Commissioner Ness noted, I also would have supported a division of number portability costs between the states and federal jurisdictions, as recommended by the National Association of Regulatory Utility Commissioners. Such an approach would have ensured that state commissions were involved in the method and timing of cost recovery.[8/]

Most importantly, federally approved mechanisms for recovery of intrastate number portability costs may undermine or conflict with valid state competition policies. For example, the two largest incumbent local exchange carriers in New York, New York Telephone Company (d/b/a Bell Atlantic-New York) and Frontier Communications of New York, Inc. (formerly known as Rochester Telephone Corporation), have different multi-year incentive rate plans in effect, the New York Telephone Performance Regulatory Plan[9/] and the Rochester Open Market Plan Agreement,[10/] respectively. Each plan was carefully crafted to

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[7/] Concurring Statement of Commissioner Susan Ness, 1-2.

[8/] Separate Statement of Commissioner Harold Furchtgott-Roth.

[9/] NYPSC Case 92-C-0665 Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone - Track 2, Opinion No. 95-13, Opinion and Order Concerning Performance Regulatory Plan (Issued and Effective August 16, 1995).

[10/] NYPSC Case 93-C-0033 Petition of Rochester Telephone Corporation for Approval of a New Multi-Year Stability Agreement and Case 93-C-0103 Petition of Rochester Telephone Corporation for Approval of Proposed Restructuring Plan, Opinion No. 94-5, Opinion and Order Approving Settlement Agreement (Issued and Effective February 17, 1994).

enhance the prospect of local competition in New York.[11/] Each company's ability to recover the intrastate costs of pro-competitive requirements, such as number portability, is subject to the terms of its agreed upon plan. By allowing recovery of intrastate number portability costs through federally-approved end-user charges, the Commission potentially and needlessly upsets the careful balance previously struck in these plans.

A federally authorized end-user surcharge also needlessly reduces the range of options available to states for striking the appropriate balance between competitive objectives and local rate setting. A "one size fits all" solution overlooks the states' longstanding expertise balancing market impacts, universal service policies and regulatory objectives.[12/] Clearly, the states are in the best position to make reasoned judgments about the appropriate manner and timing of cost recovery, consistent with the goals of the Act.

We urge the Commission to reconsider that portion of its decision that establishes national number portability cost recovery rules.

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[11/] Not only is Time Warner actively marketing its local exchange service in Frontier's service territory, but the Open Market Plan has served as a test market for potential competitors who are now developing strategies for competing in the more lucrative Bell Atlantic-New York market.

[12/] For example, it would not be sound policy for the Commission to authorize rate increases for recovery of these specific cost "onsets" without consideration of possible offsetting cost reductions in other aspects of the carriers' businesses.

## II. THE COMMISSION'S ORDER GOES BEYOND ITS AUTHORITY UNDER SECTION 251(e)(2)

### A. The Commission's Authority Is Limited To Determining The Extent To Which Each Carrier Bears A Portion of The Costs Of Establishing Number Portability

The Commission relies on Section 251(e)(2) to exercise exclusive jurisdiction over number portability cost recovery (Para. 29). Specifically, the Commission authorizes recovery of all number portability costs through a surcharge on end-users (Para. 135).

Section 152(b) of the Act preserves state jurisdiction over intrastate communications. Louisiana PSC v. FCC, 476 U.S. 355, 375-376 (1986). Congressional denial of power to the FCC in Section 152(b) can only be overcome if Congress included "unambiguous" and "straightforward" language in the Act either modifying Section 152(b) or expressly granting the Commission additional authority. Id. at 377. The Act, however, does not specifically preempt state authority over recovery of number portability costs from intrastate ratepayers nor does it modify Section 152(b).

The language of 251(e)(2) does not grant the Commission the unambiguous, straightforward authority needed to preempt the states' authority to determine how the intrastate costs of number portability should be covered. Instead, Congress authorized the Commission to ensure that number portability costs are borne by

carriers on a competitively neutral basis.[13/] It did not unambiguously declare that the Commission could determine the manner by which carriers may recover the intrastate costs of number portability.[14/] In fact, the Commission's explicit finding that 251(e)(2) is "ambiguous" is ample reason to grant this Petition (Para. 39).[15/]

The Commission should also reexamine its suggestion that this approach will minimize "administrative and enforcement difficulties" of dividing the jurisdiction over long term number portability costs (Para. 29). Just as the costs of the local loop and various other shared services and functions are capable of separations, so, too, are number portability costs. State authority over the recovery of number portability costs will not

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13/ Section 251(e)(2) provides: "The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." 47 U.S.C. 251(e)(2).

14/ Even if the statute authorizes preemption, which it does not, the Commission has not shown that its preemption of state rate recovery mechanisms, authorizing a federal end-user surcharge, is the least intrusive means for ensuring competitive neutrality. California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990).

15/ As the Order states, "Despite the Commission's tentative conclusion that section 251(e)(2) only applies to the distribution of number portability costs, we now find ambiguous the scope of the language requiring that costs 'be borne . . . on a competitively neutral basis.' We find further that reading section 251(e)(2) as applying to both distribution and recovery best achieves the congressional goal of ensuring that the costs of providing number portability do not restrict the local competition that number portability is intended to encourage. . . Therefore, we find that section 251(e)(2) requires the Commission to ensure that both the distribution and recovery of intrastate and interstate number portability costs occur on a competitively neutral basis." Para. 39.

negate any valid authority the Commission has over interstate communications or impede the distribution of number portability costs amongst carriers. See California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990). Rather, as Congress recognized, states are uniquely positioned to create methodologies, based on local market conditions, that will best serve competition.

### B. The Commission's Authority Over The Costs Associated with Establishing Number Portability Does Not Include The Ongoing Intrastate Costs For Each Carrier.

The Commission concludes that the costs to "establish" number portability go beyond the costs to create the regional databases and to upgrade the public switched telephone network (Para. 8). According to the Commission, "establishment" costs include ongoing costs for operating and maintaining the databases and the carrier-specific costs directly related to the ongoing provision of number portability services such as the querying and porting of calls from one carrier to another (Para. 38 and 68-72). However, Section 251(e)(2) does not authorize the Commission to exercise jurisdiction over the carrier-specific cost recovery mechanism for the ongoing intrastate costs of number portability. Absent "unambiguous" and "straightforward" language expressly granting the Commission this authority, Section 152(b) bars such action. Louisiana, 476 U.S. at 377.[16/]

Section 251(e)(2) specifies that the Commission may determine the cost of establishing number portability. This

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[16/] Supra, fn. 14.

Section does not delegate the Commission authority over ongoing costs of number portability.[17/] Therefore, under Section 152(b), the Commission cannot determine the recovery mechanisms associated with the carrier-specific ongoing intrastate number portability costs.

## CONCLUSION

For the reasons stated above, the Commission should reconsider its rules, which would unnecessarily and unlawfully preempt state jurisdiction over number portability cost recovery.

Respectfully submitted,

Lawrence G. Malone/cc

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Dated: July 27, 1998

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[17/] See also, Third Report and Order at Para. 38, fn. 142 wherein the Commission notes, "Common dictionary definitions define the term 'establish' as 'to found or create' or 'to bring into existence.'" See, the *American Heritage Dictionary of the English Language* 246 (1980).

## CERTIFICATE OF SERVICE

I, Lucille T. Dillenbeck, hereby certify that I have served the within and foregoing Petition for Reconsideration of the Third Report and Order by the State of New York Public Service Commission, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed upon each of the parties of record of their counsel, as reflected on the attached service list.

Lucille T. Dillenbeck

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